

1 ROBERT P. TAYLOR (SBN 46046)
Email: rtaylor@mintz.com
2 BRYAN J. SINCLAIR (SBN 205885)
Email: bsinclair@mintz.com
3 JEFFREY M. RATINOFF (SBN 197241)
Email: jratinoff@mintz.com
4 MINTZ LEVIN COHN FERRIS GLOVSKY AND
POPEO, PC
5 5 Palo Alto Square - 6th Floor
3000 El Camino Real
6 Palo Alto, CA 94306-2155
Telephone: (650) 251-7700
7 Facsimile: (650) 251-7739
8
9 Attorneys for Defendant,
SOFTSCAPE, INC.

10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA
12 OAKLAND DIVISION

13 SUCCESSFACTORS, INC, a Delaware
corporation,

14 Plaintiff,

15 vs.

16 SOFTSCAPE, INC., a Delaware corporation,
17 and DOES 1-10, inclusive,

18 Defendants.
19
20
21
22
23
24
25
26
27
28

Case No. C08-1376 CW (BZ)

**DEFENDANT'S EVIDENTIARY
OBJECTION AND REQUEST TO
STRIKE PLAINTIFF'S DECLARATION
OF KEVIN MOORE IN SUPPORT OF
PLAINTIFF'S REPLY MEMORANDUM
IN SUPPORT OF ITS MOTION TO
COMPEL PRODUCTION OF
DOCUMENTS, FURTHER
INTERROGATORY ANSWERS AND
PROPER PRIVILEGE LOGS**

Date: September 3, 2008

Time: 10:00 a.m.

Judge: Honorable Bernard Zimmerman

Location: Courtroom G 15th Floor

Complaint Filed: March 11, 2008

Trial Date: June 1, 2009

1 Defendant Softscape, Inc. (“Softscape”) hereby submits the following objections and
2 respectfully requests this Court to strike the Reply Declaration of Kevin Moore in support of
3 Plaintiff SuccessFactors, Inc.’s (“SuccessFactors”) Motion to Compel Production of Documents,
4 Further Interrogatory Answers and Proper Privilege Logs (“Moore Declaration”).

5 **I. INTRODUCTION AND STATEMENT OF FACTS**

6 On July 30, 2008, SuccessFactors filed its Motion to Compel Production of Documents,
7 Further Interrogatory Answers and Proper Privilege Logs (“Motion to Compel”). Dkt. No. 177
8 (Sealed Version). Among other things, SuccessFactors’ Motion to Compel included assertions that
9 SuccessFactors is entitled to certain of Softscape’s metadata and computer forensics information.
10 *Id.* at 7:10-28. SuccessFactors’ basis to compel Softscape to produce this information was based in
11 large part on its belief that more than 52 purported “versions” of the Presentation existed between
12 March 3 and March 24, 2008. *Id.* at 6:28. Specifically, SuccessFactors requested “all data that
13 exists as to each version in any server hard drive or file records,” including, local drive directory
14 structures, local drive file histories and audit log files from Softscape’s document collection. *Id.* at
15 7:10-18 (emphasis in original). In sum, the information requested would require Softscape to
16 conduct a burdensome forensics search of all of the operational data that exists on over twenty-two
17 computers and five servers in pursuit of this type of data.

18 Softscape filed its Opposition to the Motion to Compel on August 13, 2008 arguing that
19 SuccessFactors offered no support for its assertions, and that in any event, such material would not
20 lead to relevant, admissible evidence. Dkt. No. 186 at 2:1-4, 3:23-28. Softscape highlighted in its
21 Opposition that SuccessFactors’ allegations regarding the existence of 52 plus Presentation versions
22 were without merit, since Microsoft’s Windows and Office editing and saving processes would
23 overwrite any earlier versions to the document without creating a new copy. *Id.* at 2:21-3:3. The
24 only way these earlier “versions” would be recoverable by a user is if the user manually saved the
25 new version to a separate file in the Windows environment or if the document was sent as an
26 attachment to an email. *Id.*

27 In response, SuccessFactors filed its Reply Brief in support of its Motion to Compel, and the
28 accompanying Moore Declaration. *See* Dkt. Nos. 201 and 205 (Aug. 20, 2008). The Moore

1 Declaration and Reply Brief included newly introduced evidence (and argument based thereon)
2 further clarifying SuccessFactors' positions on why it should have access to the above material, and
3 outlining Mr. Moore's understanding of the relevance and accessibility of file extraction. *Id.*
4 Softscape objects to the untimely introduction of this new evidence and respectfully requests that
5 the Court strike the Moore Declaration in its entirety and disregard the argument in the Reply Brief
6 based thereon.

7 **II. ARGUMENT**

8 **A. SuccessFactors May Not Introduce New Evidence In Its Reply Brief.**

9 The reply is the final briefing permitted on a motion. *See* Local Rule 7-3. Thus, a party
10 offering new evidence on reply deprives the other party of a fair opportunity to respond. *Provenz v.*
11 *Miller*, 102 F.3d 1478, 1483 (9th Cir. 1996). Accordingly, the Court may strike or otherwise
12 disregard such evidence. *Id.*; *accord Contratto v. Ethicon, Inc.*, 227 F.R.D. 304, 309 (N.D. Cal.
13 2005); *see also Nautilus Group, Inc. v. Icon Health & Fitness, Inc.*, 308 F. Supp. 2d 1208, 1214
14 (W.D. Wash. 2003) (citing *Provenz* and noting "Defendant correctly moves to strike a declaration
15 with new evidence submitted in reply"); *Compana, LLC v. Aetna, Inc.*, 2006 WL 1319456, at *4 (D.
16 Wash. May 12, 2006) ("A moving party may not submit new evidence in a reply"); *Bazuaye v. INS*,
17 79 F.3d 118, 120 (9th Cir. 1996) ("Issues raised for the first time in the reply brief are waived.")

18 Here, the Court should strike the Moore Declaration, and argument based thereon, which
19 contains evidence first introduced by SuccessFactors in its reply papers. The Moore Declaration
20 contains new evidence concerning Mr. Moore's understanding of the relevance and accessibility of
21 file extraction. *See* Dkt. No. 201. Mr. Moore asserts in his Declaration SuccessFactors' belief that
22 Softscape's residual log file and metadata information contain a "chain of custody" or file path
23 information for each file. *Id.* at ¶ 8. SuccessFactors did not, however, file the Moore Declaration or
24 offer the evidence contained therein in support of its Motion to Compel, but rather only filed it in its
25 reply after Softscape pointed to the absence of evidence supporting its argument and assertions of
26 fact in SuccessFactors' moving papers.

27 Mr. Moore states in his Declaration that he is the Director of the Information Technology
28 department for SuccessFactors' counsel, Fenwick & West LLP, and has been in the legal

1 information technology field for ten years. *Id.* at ¶¶ 1, 3. While it is not clear how long Mr. Moore
2 has worked for the Fenwick firm in this capacity, it is hard to believe that SuccessFactors did not
3 have access to the information contained in the Moore Declaration when it filed its Motion to
4 Compel. Yet, SuccessFactors offers no explanation for its failure to offer this information with its
5 initial Motion to Compel. In fact, SuccessFactors failed to submit *any* evidence in support of its
6 Motion to Compel as to why Softscape’s metadata and computer forensics information was relevant
7 to their causes of action and likely to lead to admissible, relevant evidence. Instead, SuccessFactors
8 simply stated such information was needed to “piece together the trail of the Presentation” at issue.
9 Dkt. No. 177 at 7:2-3.

10 Only now, through its reply brief, does SuccessFactors attempt to refute Softscape’s
11 affirmation that SuccessFactors’ arguments in its Motion to Compel are unsupported. However,
12 SuccessFactors’ reply and accompanying Moore Declaration offer no additional support for the
13 allegations that over 52 Presentation versions exist¹, only that such versions could be obtained with
14 little effort. *See* Dkt. No. 205 at 2:19-3:6; Dkt. No. 201 at ¶¶ 8-11.

15 Finally, SuccessFactors’ reasserts in its reply that it needs all data for each “version” of the
16 Presentation, yet *still fails to offer* any support for its allegation that over 52 versions of the
17 Presentation existed at any time someplace within Softscape’s hard drives and files, which appears
18 to be the primary basis for its metadata and forensics fishing expedition. *See* Dkt. No. 205 at 2:17-
19 18. Hence, the Moore Declaration is untimely, and even if it were considered by the Court, it is
20 insufficient to support the conclusory assumptions made by SuccessFactors regarding the number of
21 versions, modifications and the various locations of the Presentation and the relevancy thereof.
22 SuccessFactors’ attempt to offer evidence for the first time in its reply to Softscape’s Opposition, in
23 a last ditch attempt to support its allegations, is thus improper.

24
25
26 ¹ In fact, SuccessFactors later contradicts this assertion by stating that Softscape’s search of local drive
27 file histories and metadata will not be burdensome since only “five versions” of the Presentation exist in
28 Softscape’s possession. Dkt. No. 205 at 5:3-5. Thus, it is clear that SuccessFactors confuses document
versions with document *modifications* throughout its reply.

1 **III. CONCLUSION**

2 For the foregoing reasons, Softscape respectfully objects to the new evidence first submitted
3 on reply in the Moore Declaration, and requests that the Court exclude the Declaration and
4 disregard the argument in the Reply Brief based thereon.

5 Dated: August 27, 2008 Respectfully submitted,

6 MINTZ, LEVIN, COHN, FERRIS, GLOVSKY AND POPEO P.C.

7 /s/ Doris M. Fournier

8 By: DORIS M. FOURNIER

9 Attorneys for Defendant,
10 SOFTSCAPE, INC.

1
2
3
4
5
6
7
8 **UNITED STATES DISTRICT COURT**
9 **NORTHERN DISTRICT OF CALIFORNIA**
10 **OAKLAND DIVISION**

11 SUCCESSFACTORS, INC, a Delaware
12 corporation,

13 Plaintiff,

14 vs.

15 SOFTSCAPE, INC., a Delaware corporation,
16 and DOES 1-10, inclusive,

17 Defendants.

Case No. CV08-1376 CW (BZ)

**[PROPOSED] ORDER GRANTING
DEFENDANT'S EVIDENTIARY
OBJECTION AND REQUEST TO
STRIKE DECLARATION OF KEVIN
MOORE IN SUPPORT OF PLAINTIFF'S
REPLY MEMORANDUM**

Judge: Honorable Bernard Zimmerman

1 Defendant Softscape, Inc. has filed an Evidentiary Objection and Request to Strike
2 Plaintiff's Declaration of Kevin Moore in Support of Plaintiff's Reply Memorandum in Support of
3 Its Motion to Compel Production of Documents, Further Interrogatory Answers and Proper
4 Privilege Logs with this Court on August 26, 2008 (Dkt. No. 201).

5 After considering the requesting papers and all other matters presented to the Court, and
6 finding good cause therefore,

7 **IT IS HEREBY ORDERED:**

- 8 1. The Declaration of Kevin Moore is so stricken;
- 9 2. The following portions of Plaintiff's Reply Brief in Support of Its Motion to Compel
10 Production of Documents, Further Interrogatory Answers and Proper Privilege Logs
11 (Dkt. No. 205) that rely upon the Declaration of Kevin Moore are so stricken:
- 12 • 3:7-10
 - 13 • 4:23-5:2
 - 14 • 5:15-17
 - 15 • 5:19-24
- 16 3. The Court will not consider the foregoing evidence in ruling on Plaintiff's Motion to
17 Compel.

18 Dated: _____

19 _____
20 The Honorable Bernard Zimmerman
21 United States Magistrate Judge

22 4414689v.2